IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. BRIAN SWARTFIGUER, Petitioner.	)	2 CA-CR 2006-0325-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200200944

Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

Brian Swartfiguer — Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 In this petition for review, petitioner Brian Swartfiguer challenges the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 Pursuant to a plea agreement, Swartfiguer was convicted of three counts of attempted molestation of a child under the age of fifteen and one count of attempted sexual conduct with a minor under the age of fifteen. In May 2004, the trial court sentenced him to presumptive, ten-year prison terms on all counts, ordering that the first two terms be served concurrently, to be followed by consecutive terms on the remaining counts. Swartfiguer then filed a notice of post-conviction relief. Appointed counsel sought and obtained numerous extensions of the time for filing a petition for post-conviction relief and ultimately filed a notice pursuant to Rule 32.4(c)(2), advising the court she had found no colorable claims to raise.

¶3 Swartfiguer filed a pro se petition in December 2005. He alleged, *inter alia*, he had been unlawfully induced to enter the guilty pleas, asserting the court had coerced him and trial counsel had been ineffective; counts one and two should have resulted in one conviction because they related to one victim; he was not competent to enter the plea; the indictment was infirm; the prosecutor was guilty of misconduct at the sentencing hearing; his counsel had failed to present certain evidence in mitigation at sentencing, including evidence regarding his mental health issues; the presentence report was inflammatory and prejudicial; and his sentences were cruel and unusual and unconstitutionally disproportionate. The trial court denied relief, signing proposed findings of fact and conclusions of law that the state had submitted. In that order, the court made clear that the presumptive prison terms were appropriate and denied relief summarily and without

specificity on all claims, finding "[t]he pleadings fail to set forth any basis for a colorable claim." The court denied Swartfiguer's motion for reconsideration in which he raised new claims for relief.

¶4 In his petition for review, Swartfiguer raises claims he appears to have raised for the first time in the motion for reconsideration. Specifically, he contends he is entitled to relief based on newly discovered evidence, *see* Rule 32.1(e), and a significant change in the law, *see* Rule 32.1(g). He contends, *inter alia*, he is entitled to sentencing relief based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Additionally, he relies on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), in challenging the validity of his guilty pleas on the ground that neither the trial court nor trial counsel advised him of the rights "referred to in *Apprendi*."

¶5 A defendant must present claims for relief in the petition filed pursuant to Rule 32.4 and Rule 32.5, not, for the first time, in a motion for rehearing filed pursuant to Rule 32.9(a). This, Swartfiguer failed to do. Moreover, neither *Blakely* nor *Apprendi* is implicated here because Swartfiguer was sentenced to presumptive prison terms. *See State v. Johnson*, 210 Ariz. 438, ¶ 12, 111 P.3d 1038, 1042 (App. 2005) ("[N]o constitutional violation occurs if the ultimate sentence falls within the range authorized by the jury verdict alone."); *see also State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005) ("[U]nder Arizona law, the statutory maximum sentence for [*Blakely*] purposes in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the

presumptive sentence."). Similarly, although we reject Swartfiguer's summary challenge to the constitutionality of A.R.S. §§ 13-1001 and 13-1401 through 13-1410, he is not entitled to relief on this or any other claim raised for the first time in the motion for reconsideration.

¶6 The majority of Swartfiguer's remaining claims were waived and are therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from seeking relief based on any ground "waived at trial"). For example, Swartfiguer contends the prosecutor was guilty of misconduct at the sentencing hearing. Swartfiguer maintains the prosecutor was "overbearing and overzealous in conducting the opening and closing statements within this sentencing hearing." But the claim is precluded because Swartfiguer did not object on this ground at the sentencing hearing. And Swartfiguer has not shown the trial court abused its discretion in denying relief on his cursorily presented claim that "state authorities" used improper, "unsavory interrogation methods to interview the child witnesses." This alleged error, like all nonjurisdictional defects, was waived by Swarfiguer's entry of the guilty pleas. *See State v. Carter*, 151 Ariz. 532, 533, 729 P.2d 336, 337 (App. 1986).

¶7 Finally, Swartfiguer has not established the trial court abused its discretion by denying relief on his claim that his sentences are cruel and unusual and unconstitutionally disproportionate. As our supreme court stated in *State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006), *quoting Ewing v. California*, 538 U.S. 11, 20, 23, 123 S. Ct. 1179, 1185, 1186-87 (2003) (O'Connor, J., concurring in the judgment), *quoting Harmelin v. Michigan*, 501 U.S. 957, 997, 111 S. Ct. 2680, 2702 (1991) (Kennedy, J., concurring in

part and concurring in the judgment), "courts are extremely circumspect in their Eighth Amendment review of prison terms. The Supreme Court has noted that noncapital sentences are subject only to a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate' to the crime." Swartfiguer victimized three children, two of whom were ten years of age and the third who was eight. The imposition of presumptive prison terms for these offenses can hardly be characterized as satisfying the requisite threshold showing of gross disproportionality. *See id.* ¶ 16.

¶8 The petition for review is granted but relief is denied.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge